STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: MR. AND MRS. GREGORY SWECKER, Complainants, vs. MIDLAND POWER COOPERATIVE, Respondent.	DOCKET NO. FCU-99-3 (C-99-76)

ORDER DENYING PARTIAL MOTION TO DISMISS

(Issued October 8, 1999)

On September 16, 1999, Central Iowa Power Cooperative (CIPCO) and the Iowa Association of Electric Cooperatives (IAEC) (collectively, the Intervenors) filed an "Intervenors' Partial Motion to Dismiss." On September 30, 1999, the Sweckers filed a resistance to the motion. Also on September 30, 1999, the Office of Consumer Advocate (OCA) filed a response to the motion.

In their motion, the Intervenors assert that the Board's decision to review Midland's rates and charges, in an effort to enforce the provisions of Iowa Code § 476.21 (1999), constitutes an effort to indirectly subject Midland to rate regulation in violation of Iowa Code § 476.1A. The Intervenors further assert that, although § 476.1A states that § 476.21 applies to electric utilities exempt from rate regulation, the section does not grant the Board authority to enforce the code section

against non-rate-regulated utilities. The Intervenors further assert any action to enforce § 476.21 against non-rate-regulated utilities must be pursued in state court. In addition, the Intervenors state that 16 U.S.C. § 824a-3(f) draws a distinction between utilities over which the Board has rate-making authority and those not subject to rate-making authority. By this distinction, the Intervenors apparently argue that 16 U.S.C. § 824a-3(f) conveys authority to the Board to implement the federal law with respect to utilities subject to rate regulation, but that with respect to non-rate-regulated utilities such as Midland, authority to implement the federal rules was retained by the federal commission. The Intervenors argue that "the retention of implementation and enforcement as it relates to non-rate regulated utilities clearly evidences an intent by Congress to preempt any and all state regulations of non-rate regulated utilities with respect to the rates that can be charged by such an entity to any qualifying co-generation facility or qualifying small power production facility such as the complainants in this case." The Intervenors therefore request the Board to reconsider a part of its June 23, 1999, Order and dismiss the parts of this case which relate to rates and charges assessed by Midland to the complainants.

Midland did not join in the motion by the Intervenors, and did not file any resistance or response to the motion. It is somewhat troubling that CIPCO and the IAEC intervened in this case, filed a motion to dismiss asserting arguments on behalf of Midland rather than themselves, and that Midland did not join in the motion. However, we assume that if we declined to rule on the motion on that basis, Midland

would refile the motion on its own behalf. Therefore, we will address the motion at this time.

In their resistance, the Sweckers assert that Iowa Code § 476.21 grants the Board authority to prevent discrimination against renewable energy sources, and explicitly states that it applies to electric co-operative associations such as Midland. The Sweckers state that the question presented is whether Board enforcement of § 476.21 is the regulation of rates. They state that they are not asking the Board to establish or approve Midland's rates, but only asking that Midland's rates and fees not discriminate against renewable energy sources, and that the Board rule that Midland must treat all of its customers the same. The Sweckers argue that Iowa Code §§ 476.1A and 476.21 should be construed in harmony with each other to allow both to stand and give force and effect to each. The Sweckers further argue that the Board's authority is not preempted by federal law.

In its response to the motion to dismiss, the OCA asserts that the Board's June 23rd Order was correct, that the Board has the ability to enforce Iowa Code § 476.21, and that federal law does not preempt an action brought under § 476.21. The OCA states that § 476.1A provides both that electric cooperatives are not subject to rate regulation authority of the Board, and that they are subject to § 476.21. The OCA further states that § 476.21 explicitly provides that electric cooperatives such as Midland are subject to the section, and the Board has the

authority to enforce the section. Furthermore, the OCA argues that federal law does not preempt the Board's enforcement of § 476.21.

Iowa Code § 476.1A (1999) provides that rural electric cooperatives such as Midland are not subject to the rate regulation of the Board. However, § 476.1A also provides that such cooperatives "are subject to all other regulation and enforcement activities of the board." Id. The section further states that § 476.21 applies to electric cooperatives. It also states that electric cooperatives exempt from rate regulation "shall not make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage." Iowa Code § 476.1A.

Iowa Code § 476.21 states that electric cooperatives, among other listed utilities, "shall not consider the use of renewable energy sources by a customer as a basis for establishing discriminatory rates or charges for any service or commodity sold to the customer or discontinue services or subject the customer to any other prejudice or disadvantage based on the customer's use or intended use of renewable energy sources." The term "renewable energy sources" includes wind power. Id.

The board and the undersigned have the authority to review whether Midland has violated Iowa Code §§ 476.1A and 476.21, and to enforce those provisions. Iowa Code §§ 476.2(1), 476.3(1). Iowa Code §§ 476.1A and 476.21 do not provide authority to allow the board or the undersigned to set rates for Midland. However,

the preceding code sections do allow the board to review Midland's rates, charges, and services offered to the Sweckers and Mr. Welch (the complainants) to determine whether those rates, charges, and services are discriminatory as to the complainants, or whether Midland discontinued services or subjected the complainants to any other prejudice or disadvantage based on the complainants' use of renewable energy sources. Iowa Code §§ 476.1A, 476.2(1), 476.3(1), 476.21.

The Board and the undersigned are to give effect to the intent of the legislature by looking at the entire statutory scheme, and by construing its sections in harmony with one another to give full effect to each section. State v. Ahitow, 544 N.W.2d 270, 273 (Iowa 1996); Harden v. State, 434 N.W.2d 881, 884 (Iowa 1989); Polk County v. Ia. Natural Resources Council, 377 N.W.2d 236, 241 (Iowa 1985). The assertion by the Intervenors that the Board is attempting to indirectly subject Midland to rate-regulation by enforcing Iowa Code § 476.21 is simply incorrect. The Intervenors cite to Nishnabotna Valley Rural Electric Cooperative v. Iowa Power and Light Co., 161 N.W.2d 348 (Iowa 1968), as authority that the Board may not indirectly subject Midland to rate regulation. However, the Nishnabotna Court specifically stated the case did not deal with rate discrimination against other members of the cooperative. Nishnabotna, *supra at* p. 354 n.2. The Intervenors' assertion that the Board does not have the authority to enforce § 476.21 against non-rate regulated utilities is also incorrect. Iowa Code §§ 476.2(1), 476.3(1).

The Intervenors argue that 16 U.S.C. § 824a-3(f) preempts state regulation of rates that can be charged to co-generators and small power producers by non-rate-regulated utilities, and cite Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987) as support.

Federal preemption is based on the supremacy clause of the U.S. Constitution. U.S. Const. art. VI, cl. 2.; Lubben v. Chicago Cent. and Pacific R. Co., 563 N.W.2d 596 (Iowa 1997). Preemption is explicit when Congress expressly states its intention to preempt state law, and is implicit when Congress indicates an intention to occupy an entire field of regulation, excluding state law. Lubben, *supra at* 598-9; Olson v. Prosoco, Inc., 522 N.W.2d 284 (Iowa 1994). "Implicit preemption will most likely be found when it is determined that state law conflicts with congressional policy." Olson, *supra at* 293. Implicit preemption occurs "where Congress has legislated comprehensively, thus occupying the entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Freehold v. Bd. Reg. Com'rs of N.J., 44 F.3d 1178, 1190 (3rd Cir. 1995)(quoting Louisiana Public Service Com. v. FCC, 476 U.S. 355, 368-69 (1986)).

"Courts are reluctant to find preemption; thus the party seeking to establish preemption must show that it is 'the clear and manifest purpose of Congress'."

Lubben, *supra at* 598-9 (quoting CSX Transp., Inc., v. Easterwood, 507 U.S. 658, 664 (1993)).

The Iowa Supreme Court has stated that "state law will not be preempted absent a clear statement of Congressional intent to occupy an entire field, or 'unless it conflicts with federal law or would frustrate the federal scheme'." Barske v. Rockwell Intern. Corp., 514 N.W.2d 917, 925 (Iowa 1994)(quoting Conaway v. Webster City Prods. Co., 431 N.W.2d 795, 797 (Iowa 1988)).

"In determining whether a federal law preempts state action, our role is to ascertain congressional intent. [cite] If the federal statute pertains to an activity traditionally regulated by the states, the statute will be construed to protect state authority unless 'the clear and manifest purpose of Congress' is to preempt. [cite] " Iowa Telephone Ass'n v. City of Hawarden, 589 N.W.2d 245, 251 (Iowa 1999).

16 U.S.C. § 824a-3 seeks to encourage the development of cogeneration and small power production facilities. FERC v. Mississippi, 456 U.S. 532 (1982). The law was passed partly because Congress believed that electric utilities were reluctant to purchase power from, and sell power to, alternate energy producers. Id.

§ 824a-3(a) provides that FERC shall prescribe rules necessary to encourage cogeneration and small power production, which rules must require electric utilities to offer to sell electric energy to qualifying cogenerators and small power producers, and purchase energy from such producers. The section also states that rules must include provisions regarding reliability of energy from and to such producers.

16 U.S.C. § 824a-3(b) provides that the rules must ensure that rates paid by utilities for purchase of energy from cogenerators or small power producers must be just and reasonable to the electric consumers of the electric utility and in the public interest, and must not discriminate against the producers. It also provides that the rules may not provide for a rate which exceeds the incremental cost to the utility of alternative electric energy.

16 U.S.C. § 824a-3(c) provides that the rules must ensure that rates for sale of energy from the utility to the cogenerator or small power producer must be just and reasonable and in the public interest, and may not discriminate against the cogenerator or small power producer.

16 U.S.C. 824a-3(f) provides that within one year of any rule being prescribed by FERC pursuant to subsection (a), state regulatory authorities must implement the rule for each electric utility for which they have ratemaking authority, and each nonregulated utility must implement the rule. Nonregulated utility means a non-rate-regulated utility. 16 U.S.C. § 2602(9) and (18).

The Intervenors argue that by distinguishing between rate-regulated and non-rate-regulated utilities, 16 U.S.C. § 824a-3(f) shows “an intent by Congress to preempt any and all state regulations of non-rate regulated utilities with respect to the rates that can be charged by such an entity to any qualifying co-generation facility or qualifying small power production facility such as the complainants in this case.”

There is no explicit statement of preemption in the statutes. In order to find explicit preemption, statutes must contain an express statement that states may not regulate in an area, such as in cigarette labeling ("No statement relating to smoking and health shall be required… .") or pesticide labeling under FIFRA ("Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.") *See* Cipollone v. Liggett Group, Inc., 505 U.S.504 (1992); Ackerman v. American Cyanamid Co., 586 N.W.2d 208 (Iowa 1998); Clubine v. American Cyanamid Co., 534 N.W.2d 385 (Iowa 1995).

There is no statement by Congress that the states are not free to promulgate nondiscrimination statutes in conformance with the federal statutes. 16 U.S.C. § 824a-3. §§ 824a-3(b) and (c), the two sections which set forth the requirements for just and reasonable rates in the public interest and nondiscrimination, contain no statements that states are not free to promulgate similar statutes, and contain no distinction between rate-regulated utilities and non-rate-regulated utilities.

There is no clear statement of Congressional intent to occupy the entire field of regulation of relationships between small power producers and utilities, whether they be rate-regulated or non-rate-regulated. Rather, the statutes explicitly provide for joint regulation in the field by state and federal authorities, and limited federal jurisdiction over both rate-regulated and non-rate-regulated utilities. 16 U.S.C. §§ 824 and 824a-3; FERC v. Mississippi, 456 U.S. 742 (1982); Freehold Cogeneration

v. Bd. Reg. Com'rs of N.J., 44 F.3d 1178 (3rd Cir. 1995); Greensboro Lumber Co. v. Georgia Power Co., 643 F.Supp. 1345 (N.D.Ga. 1986), aff'd 844 F.2d 1538 (11th Cir. 1988).

Iowa Code § 476.1A, which provides that electric cooperatives may not grant unreasonable preferences or advantages as to rates or services and may not subject any person to any unreasonable prejudice or disadvantage, and Iowa Code § 476.21, which provides that electric cooperatives may not establish discriminatory rates against customers using renewable resources, or discontinue services or subject such customers to any prejudice or other disadvantage, are entirely consistent with the terms and the purposes of 16 U.S.C. 824a-3(b) and (c). The purpose of Section 210 of PURPA, 16 U.SC. § 824a-3, is to encourage the development of cogeneration and small power production facilities by requiring utilities to purchase power from, and sell power to, those facilities. American Paper Inst. v. American Elec. Power, 461 U.S. 402 (1983); FERC v. Mississippi, *supra at* 541-2. The terms of Iowa Code §§ 476.1A and 476.21 are very similar to those of 16 U.S.C. 824a-3(b) and (c). They are not in conflict with the federal regulations promulgated pursuant to 16 U.S.C. 824a-3(b) and (c). *See* 18 C.F.R. § 292.303 et seq. Therefore, there is no implicit preemption of the Board's authority to enforce Iowa Code §§ 476.1A and 476.21. Matter of Guardianship & Conservatorship of Cavin, 333 N.W.2d 840, 841 (Iowa 1983); Powers v. McCullough, 140 N.W.2d 378, 382 (Iowa 1966).

The Iowa Power case cited by the Intervenors does not support the position that 16 U.S.C. 824a-3(f) preempts the Board's authority to enforce Iowa Code § 476.21 against Midland. That decision held that Iowa Code §§ 476.41-.45 (1999) applied only to rate-regulated electric utilities. Iowa Power & Light Company v. Iowa State Commerce Commission, 410 N.W.2d 236 (Iowa 1987). (See discussion in Order Regarding Responses issued September 28, 1999.)

IT IS THEREFORE ORDERED:

The Partial Motion to Dismiss filed by CIPCO and the IAEC is hereby denied.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary, Deputy

Dated at Des Moines, Iowa this 8th day of October, 1999.